

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

STEVE EIDEN,

Plaintiff,

v.

HOME DEPOT USA, INC., dba
HOME DEPOT #6609; and HD
PROPERTIES OF MARYLAND,

Defendants.

NO. CIV. S-04-977 LKK/CMK

O R D E R

The court is in receipt of both defendant's motion for summary judgment as well as plaintiff's opposition to (and cross-motion for) summary judgment. The court is further in receipt of plaintiff's declaration and request for a Rule 56(f) continuance.

"Federal Rule of Civil Procedure 56(f) provides a device for litigants to avoid summary judgment when they have not had sufficient time to develop affirmative evidence." Burlington Northern & Santa Fe R.R. Co. v. The Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, Montana, 323 F.3d 767, 773.

1 Although district courts have "wide latitude in controlling
2 discovery," State of California v. Campbell, 138 F.3d 772, 779
3 (9th Cir. 1998), the Supreme Court has required allowing discovery
4 "where the nonmoving party has not had the opportunity to discover
5 information that is essential to its opposition." Anderson v.
6 Liberty Lobby, Inc., 477 U.S. 242, 250 n. 5 (1986). A Rule 56(f)
7 motion must be brought before the summary judgment hearing, Ashton-
8 Tate Corp. v. Ross, 916 F.2d 516, 520 (9th Cir. 1990), and the
9 facts supporting a Rule 56(f) motion must be set forth in an
10 accompanying affidavit. Campbell, 138 F.3d at 779 (9th Cir.
11 1998).¹

12 In the case at bar, plaintiff brings his action under the
13 Americans with Disabilities Act ("ADA") and state law. Plaintiff
14 seeks injunctive relief and damages from defendant, Home Depot,
15 based on alleged access barriers at the Home Depot store located
16 at 2580 Notre Dame Boulevard in Chico, California. In its motion
17 for summary judgment, Home Depot maintains that plaintiff's claims
18 are moot as the Store's premises were recently modified and are now
19 in full compliance with the requirements of the ADA. Def.'s Mot.
20 for Summ. J. at 4:26.

21 In plaintiff's request for a Rule 56 (f) continuance,
22 plaintiff asserts that he "cannot responded to defendant's mootness
23

24 ¹ Defendants must show (1) that they have set forth in
25 affidavit form the specific facts that they hope to elicit from
26 further discovery, (2) that the facts sought exist, and (3) that
these sought-after facts are "essential" to resist the summary
judgment motion. Campbell, 138 F.3d at 779.

1 argument without conducting a site inspection." An inspection by
2 both the plaintiff himself and plaintiff's expert will allow
3 plaintiff to determine if the previously identified ADA violations
4 have been removed. Hubbard Dec. at ¶¶ 6-8.

5 Given that discovery is not closed and plaintiff has yet to
6 inspect the recent modifications made at the Home Depot facility,
7 any motion for summary judgment by defendant would be premature at
8 this point in time. Knowing exactly what modifications were made
9 constitutes sought-after facts clearly essential to the plaintiff's
10 ability to respond to the defendant's motion for summary judgment.
11 Because plaintiff has set forth sought-after facts that are
12 "essential" to avoid summary judgment, defendant's motion for
13 summary judgment is DENIED without prejudice to renewal after the
14 close of discovery. Plaintiff's cross-motion is likewise DENIED.

15 IT IS SO ORDERED.

16 DATED: September 14, 2005

17 /s/Lawrence K. Karlton
18 LAWRENCE K. KARLTON
19 SENIOR JUDGE
20 UNITED STATES DISTRICT COURT
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